

## **2005 DRAFTING REQUEST**

### **Bill**

Received: **12/01/2005**

Received By: **pkahler**

Wanted: **As time permits**

Identical to LRB:

For: **Patricia Strachota (608) 264-8486**

By/Representing: **Sara Buschman**

This file may be shown to any legislator: **NO**

Drafter: **pkahler**

May Contact:

Addl. Drafters:

Subject: **Public Assistance - med. assist.**

Extra Copies:

Submit via email: **YES**

Requester's email: **Rep.Strachota@legis.state.wi.us**

Carbon copy (CC:) to:

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### **Pre Topic:**

No specific pre topic given

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### **Topic:**

Various modifications to MA divestment rules

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### **Instructions:**

See Attached

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### **Drafting History:**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	pkahler 12/01/2005	jdye 12/01/2005					
/P1			pgreensl 12/02/2005		lnorthro 12/02/2005		
/1	pkahler 12/20/2005	jdye 12/22/2005	chaugen 12/28/2005		sbasford 12/28/2005	lnorthro 01/12/2006	

FE Sent For:

<END>

none  
needed

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FE Sent For:

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## WISCONSIN LEGISLATIVE COUNCIL

*Terry C. Anderson, Director*  
*Laura D. Rose, Deputy Director*

TO: REPRESENTATIVE PAT STRACHOTA

FROM: Richard Sweet, Senior Staff Attorney

RE: WLC: 0235/2 (Divestment of Assets)

DATE: October 4, 2005

Attached is a draft prepared at your request--WLC: 0235/2, relating to ineligibility for Medical Assistance based on a transfer of assets. The draft is based on six recommendations set forth in a Draft Medicaid Divestment Concept Paper prepared by the Department of Health and Family Services (DHFS), a copy of which is also attached to this memorandum.

The draft makes the following six changes in Wisconsin's statutes on divestment and requires the Secretary of DHFS to request a federal waiver that allows implementation of the statutory changes:

1. The draft includes transfers of assets that are otherwise exempt in determining Medical Assistance eligibility (e.g., a home) in determining whether divestment has occurred.
2. The draft provides that a person who divests assets is ineligible for all Medical Assistance services. Current law only makes a person ineligible for specified Medical Assistance services.
3. The draft extends the "look-back date" for divestment to 72 months. Currently, the look-back date is 36 months, except that for trust assets the look-back date is 60 months.
4. The draft specifies that the period of ineligibility based on divestment is determined by dividing the total uncompensated value of assets transferred on or after the look-back date by the average monthly cost to a Medical Assistance patient of a nursing home. Currently, the total uncompensated value of transferred assets is divided by the average monthly cost to a private pay patient of a nursing home in determining the ineligibility period.
5. The draft specifies that the ineligibility period begins on the first day of the month in which a person applies for and is otherwise eligible for Medical Assistance, or when a county social services department becomes aware of the transfer of assets for less than fair market value, whichever occurs

later. Currently, the ineligibility period begins on the first day of the first month after which assets have been transferred for less than fair market value.

6. The draft specifies that transfers of assets under the divestment statutes include interspousal transfers of assets. In addition, the draft amends the spousal impoverishment statutes to provide that assets that a spouse living in the community acquires after the institutionalized spouse becomes eligible for Medical Assistance are to be considered in determining eligibility for the institutionalized spouse. Currently, assets acquired by the spouse in the community after the eligibility determination generally are not considered.

Each of the above statutory changes is contingent on receipt of a federal Medical Assistance waiver or a change in federal law that allows implementation of the statutory change.

Feel free to contact me if I can be of further assistance.

RNS:rv

Attachments



1       **AN ACT** *to amend* 49.453 (1) (f) (intro.), 49.453 (2) (title), (a) and (b), 49.453 (3) (a),  
2           49.453 (3) (b) 2., 49.453 (8) and 49.455 (5) (b) and (d); and *to create* 49.453 (1) (im)  
3           of the statutes; **relating to:** ineligibility for medical assistance based on a transfer of  
4           assets.

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

5       ✓ **SECTION 1.** 49.453 (1) (f) (intro.) of the statutes is amended to read:

6           49.453 (1) (f) "Look-back date" means for a covered individual, the date that is 36 72  
7           months before, ~~or with respect to payments from a trust or portions of a trust that are treated~~  
8           as assets transferred by the covered individual under s. 49.454 (2) (c) or (3) (b) the date that  
9           is 60 months before:

10       ✓ **SECTION 2.** 49.453 (1) (im) of the statutes is created to read:

11           49.453 (1) (im) "Transfer" includes interspousal transfers. *necessary? no*

12       ✓ **SECTION 3.** 49.453 (2) (title), (a) and (b) of the statutes are amended to read:

13           49.453 (2) (title) INELIGIBILITY FOR MEDICAL ASSISTANCE FOR CERTAIN SERVICES.

14           ~~(a) Institutionalized individuals.~~ Except as provided in sub. (8), if a covered ~~If~~ an institutionalized

15           individual or his or her spouse, or another person acting on behalf of the institutionalized covered

16           individual or his or her spouse, transfers assets for less than fair market value on or after the

17           covered institutionalized individual's look-back date, the covered institutionalized individual is ineligible for

18           medical assistance for the following services for the period specified under sub. (3): ← *keep*

19           1. For nursing facility services.

20           2. For a level of care in a medical institution equivalent to that of a nursing facility.

1           3. For services under a waiver under 42 USC 1396n.

2           ~~(b) Noninstitutionalized individuals. Except as provided in sub. (8), if a~~  
3           ~~noninstitutionalized individual or his or her spouse, or another person acting on behalf of the~~  
4           ~~noninstitutionalized individual or his or her spouse, transfers assets for less than fair market~~  
5           ~~value on or after the noninstitutionalized individual's look-back date, the noninstitutionalized~~  
6           ~~individual is ineligible for medical assistance for the following services for the period~~  
7           ~~specified under sub. (3):~~

8           1. Services that are described in 42 USC 1396d (a) (7), (22) or (24).

9           2. Other long-term care services specified by the department by rule.

10          ✓ SECTION 4. 49.453 (3) (a) of the statutes is amended to read:

11           49.453 (3) (a) The period of ineligibility under this subsection begins on the first day  
12           of the first month beginning on or after the look-back date during or after which assets have  
13           been transferred for less than fair market value and that does not occur in any other periods  
14           of ineligibility under this subsection in which an individual applies for and is otherwise  
15           eligible for medical assistance, or when a county department under s. 46.215, 46.22, or 46.23  
16           becomes aware of the transfer of assets for less than fair market value, whichever occurs later. <sup>is?</sup>

17          ✓ SECTION 5. 49.453 (3) (b) 2. of the statutes is amended to read:

18           49.453 (3) (b) 2. The department shall determine the average monthly cost to a private  
19           medical assistance patient of nursing facility services in the state at the time that the covered  
20           individual applied for medical assistance.

21          ✓ SECTION 6. 49.453 (8) of the statutes is amended to read:

22           49.453 (8) INAPPLICABILITY. Subsections (2) and (3) do not apply to transfers of assets  
23           if the assets are exempt under 42 USC 1396p (c) (2) or if the department determines that

↑  
include transfers to spouse

1 application of this section would work an undue hardship. ~~The department shall promulgate~~  
2 ~~rules concerning the transfer of assets exempt under 42 USC 1396p (c) (2).~~

3 ✓ **SECTION 7.** 49.455 (5) (b) and (d) of the statutes are amended to read:

4 49.455 (5) (b) Notwithstanding ch. 766, in determining the resources of an  
5 institutionalized spouse ~~at the time of application for medical assistance~~, the amount of  
6 resources considered to be available to the institutionalized spouse equals the value of all of  
7 the resources held by either or both spouses minus the greatest of the amounts determined  
8 under sub. (6) (b) 1. to 4.

9 (d) During a continuous period of institutionalization, after an institutionalized spouse  
10 is determined to be eligible for medical assistance, ~~no~~ resources of the community spouse are  
11 considered to be available to the institutionalized spouse.

12 **SECTION 8. Nonstatutory provisions.**

13 (1) By the first day of the 7th month beginning after publication of this act, the secretary  
14 of health and family services shall submit to the federal department of health and human  
15 services a request for a waiver under 42 USC 1315 (a) that allows implementation of all of the  
16 provisions of this act.

17 **SECTION 9. Effective dates.** This act takes effect on the day after publication, except  
18 as follows:

19 (1) The treatment of section 49.453 (1) (f) (intro.) of the statutes by this act takes effect  
20 on the date that the revisor of statutes publishes in the Wisconsin administrative register a  
21 statement that the secretary of health and family services has certified to the revisor that either  
22 of the following has occurred:

23 (a) A waiver has been granted by the federal department of health and human services  
24 that allows Wisconsin to implement the statutory change.

*probably need initial app, too*

*needs require dept to  
publish notice*

1 (b) Federal law has been changed in a manner that allows Wisconsin to implement the  
2 statutory change.

3 (2) The treatment of sections 49.453 (1) (im) and 49.455 (5) (b) and (d) of the statutes  
4 by this act takes effect on the date that the revisor of statutes publishes in the Wisconsin  
5 administrative register a statement that the secretary of health and family services has certified  
6 to the revisor that either of the following has occurred:

7 (a) A waiver has been granted by the federal department of health and human services  
8 that allows Wisconsin to implement the statutory change.

9 (b) Federal law has been changed in a manner that allows Wisconsin to implement the  
10 statutory change.

11 (3) The treatment of section 49.453 (2) (title), (a) and (b) of the statutes by this act takes  
12 effect on the date that the revisor of statutes publishes in the Wisconsin administrative register  
13 a statement that the secretary of health and family services has certified to the revisor that  
14 either of the following has occurred:

15 (a) A waiver has been granted by the federal department of health and human services  
16 that allows Wisconsin to implement the statutory change.

17 (b) Federal law has been changed in a manner that allows Wisconsin to implement the  
18 statutory change.

19 (4) The treatment of section 49.453 (3) (a) of the statutes by this act takes effect on the  
20 date that the revisor of statutes publishes in the Wisconsin administrative register a statement  
21 that the secretary of health and family services has certified to the revisor that either of the  
22 following has occurred:

23 (a) A waiver has been granted by the federal department of health and human services  
24 that allows Wisconsin to implement the statutory change.

1 (b) Federal law has been changed in a manner that allows Wisconsin to implement the  
2 statutory change.

3 (5) The treatment of section 49.453 (3) (b) 2. of the statutes by this act takes effect on  
4 the date that the revisor of statutes publishes in the Wisconsin administrative register a  
5 statement that the secretary of health and family services has certified to the revisor that either  
6 of the following has occurred:

7 (a) A waiver has been granted by the federal department of health and human services  
8 that allows Wisconsin to implement the statutory change.

9 (b) Federal law has been changed in a manner that allows Wisconsin to implement the  
10 statutory change.

11 (6) The treatment of section 49.453 (8) of the statutes by this act takes effect on the date  
12 that the revisor of statutes publishes in the Wisconsin administrative register a statement that  
13 the secretary of health and family services has certified to the revisor that either of the  
14 following has occurred:

15 (a) A waiver has been granted by the federal department of health and human services  
16 that allows Wisconsin to implement the statutory change.

17 (b) Federal law has been changed in a manner that allows Wisconsin to implement the  
18 statutory change.

19

(END)

## **DRAFT Medicaid Divestment Concept Paper**

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### **Proposal**

We propose to pursue a federal waiver under §1115(a) of the Social Security Act, which would allow Wisconsin to handle Medicaid divestment differently than is currently allowed under federal law. Wisconsin's waiver will focus on closing loopholes in federal law that allow individuals to shelter or transfer their assets in order to qualify for Medicaid coverage of their long term care needs. Wisconsin's waiver will not change public policy that currently protects our most vulnerable populations or that deprives Wisconsin citizens of the opportunity to receive quality long-term care. The waiver, when granted and implemented, will require those persons with financial resources to use those resources for their health care needs before asking for Medicaid to pay for their long-term care.

Under §16.54 of the Wisconsin Statutes, the Department will seek this waiver without first receiving legislative approval to do so. This action is based upon an interpretation of §16.54 of the Wisconsin Statutes by the Department's Office of Legal Counsel. Counsel also warns that while this theory is legally sound, it is important to bear in mind that proceeding upon this theory would depart from a long-standing tradition of seeking express legislative authorization for submission of all Medicaid waiver applications and most significant Medicaid state plan amendments. Moreover, while there are no reported formal Attorney General opinions on point, at least one former Assistant AG who handled Medicaid matters did take the position that the Department requires explicit and distinct legislative authority for each Medicaid it submits.

However, the changes sought in the divestment waiver will require changes in current state divestment law. Therefore, when the waiver is granted by Centers for Medicare and Medicaid Services (CMS), changes in state law must be made in order to implement the provisions of the waiver.

### **Background**

Divestment is the transfer of income, non-exempt assets (i.e., assets that are counted when determining Medicaid eligibility), and homestead property, for less than fair market value.

Medicaid divestment rules apply to:

- Persons in long term care medical institutions, such as nursing homes;
- Persons applying for or participating in the Medicaid Community Waivers programs; and,
- Medicaid recipients not in a long term care medical institution or participating in a waiver, but receiving long-term care services.

Changes to divestment laws have occurred over the last 15 years at both the federal and state level. In 1988, the Medicare Catastrophic Coverage Act of 1988 (MCCA) was enacted, completely revising the manner in which the transfer of assets by a Medicaid

## **DRAFT Medicaid Divestment Concept Paper**

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applicant or recipient was penalized. Further changes were made at the federal level with the Omnibus Budget Reconciliation Act of 1990 (OBRA 90) which further defined divestment, particularly as it applied to trusts, and made several small technical changes to the spousal impoverishment provisions.

State statutes on divestment were changed in the 1989-1991, the 1993-1995 and the 2001-2003 Biennial Budget Acts. The change in 1989 mirrored the changes in the divestment sections of federal law in MCCA.

In the 1993-1995 Biennial Budget Act, Wisconsin sought to eliminate several 'loopholes' in state law within the strict constraints of federal law. Specifically, Wisconsin tied the transfer of funds into annuities to life expectancy, more closely defined when divestment occurred using joint accounts, and defined what was divested when payments for services between family members were made.

In the 2001-2003 Biennial Budget Act, Wisconsin defined that payments made from annuities that were not made at regular frequency, of similar amounts or reflected a market level return were divestment.

While these divestment changes have been partially effective, estate planners have adopted new strategies that need to be addressed. Support for additional divestment changes has been received from the provider community, particularly the Wisconsin Health Care Association and the Wisconsin Association of Homes and Services for the Aging. Local agency managers and staff have also strongly suggested that the Department adopt tougher divestment measures.

Wisconsin is not alone in its divestment experience. Many other states, particularly those with more generous institutions and home and community based waiver programs are facing similar challenges. The states of Minnesota and Connecticut are taking some of the steps described in this paper to curb the transferring of assets to qualify for long term care Medicaid.

Minnesota's Waiver Application has not yet been acted on by CMS. CMS has asked Minnesota to consider agreeing to a 'cap' on overall Medicaid spending on the elderly and disabled in order to ensure budget neutrality of their waiver request. Minnesota does not appear amenable to this request. It is important to note that Minnesota has not applied any significant pressure on CMS associated with this topic through their congressional delegation or advocacy groups.

### **Discussion**

Wisconsin's Medicaid divestment rules involve several different policy concepts. These concepts include:

- **Lookback Period** - In the application process for Medicaid, or upon the institutionalization of someone already eligible for Medicaid, if it is determined that

## **DRAFT Medicaid Divestment Concept Paper**

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divestment occurred during the “lookback period”, the person may be found ineligible for full-benefit Medicaid for a period of time. The lookback period for divestments not involving trusts is 36 months. The lookback period for trust-related divestments is 60 months.

- **Penalty Period** - If a divestment occurred during the lookback period, a “penalty period” is calculated, the duration of which is equal to the number of months that result from dividing the divested amount by the average nursing home cost to a private pay patient (\$4,542). All fractions are rounded downward (e.g., 8.6 = 8 months, .7 = 0 months).

For example, if a person divests \$80,816, that amount is divided by \$4,542 (17.79) to arrive at a penalty period of 17 months.

During the penalty period, Medicaid will not pay for the person's long term care services, either in the institution, or in the community under the waivers. If in an institution, however, Medicaid will pay for “card services” during the penalty period (i.e., acute and primary care services such as dental, pharmacy, physician services, etc.).

It is important to note that the penalty period begins with the month the divestment occurred. Consequently, a person's penalty can be “served” before s/he even applies for the program. Under those circumstances, there really is no penalty for having divested.

For example, a person enters a nursing home and applies for Medicaid in September 2003. There are no trusts involved, so the lookback period is 36 months. Therefore, the lookback period is August 2003 back to September 2000. It is determined that the person divested \$80,816 in April 2002. The penalty period is 17 months, beginning in April 2002 and ending in August 2003. The person is determined eligible for full benefit Medicaid beginning September 1, 2003, because their divestment penalty period is over.

- **Exceptions** - Not all transfers for less than fair market value during the lookback period are considered to be divestment. The following are examples of transfers that do not constitute divestment under current policy:
  - ◆ The person who divested shows that the divestment wasn't made with the intent of receiving Medicaid. The person must present evidence that shows the specific purpose and reason for making the transfer. Verbal assurances that s/he was not trying to become financially eligible for Medicaid are not sufficient.
  - ◆ The community spouse divested assets that were part of the community spouse asset share. S/he can give them to anyone without affecting the eligibility of the institutionalized spouse.



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- ◆ The person intended to dispose of the asset either at fair market value or other valuable consideration; that is, the person was unaware of the real fair market value of the asset.
- ◆ The agency determines that denial of eligibility would work undue hardship on the person. "Undue hardship" is a serious impairment to the person's immediate health.
- ◆ Under certain circumstances, the person or his/her spouse is allowed to divest homestead property (e.g. to his/her spouse, child who is disabled or under 21, sibling who lives in the home and has ownership interest, etc.)
- ◆ Under certain circumstances, the person or his/her spouse is allowed to divest non-homestead assets (e.g., to his/her spouse, disabled child, etc.)

### **Recommendations for Closing Divestment Loopholes Using A Waiver**

In order to shut the loopholes that exist in current federal law, DHCF is recommending that the Department request a waiver under §1115(a) of the Social Security Act with the following provisions:

- ◆ Transfer of Exempt Assets Prohibited. Currently, transfer prohibitions affect the transfer of income, non-exempt assets, and homestead property. Wisconsin could request waiver authority, as has Minnesota, to expand transfer prohibitions to include the transfer of all assets, including exempt assets. Transfers of exempt assets, such as vehicles, currently not subject to divestment policy, would be deterred, or would be subject to penalty and thereby result in a savings of Medicaid dollars.
- ◆ Complete Ineligibility for Medicaid. Currently, under a divestment penalty, Medicaid does not pay for long term care services either in a nursing home, or in the community. Acute and primary care services, however, remain covered by Medicaid during the penalty period. Wisconsin could request waiver authority, as has Minnesota, to expand the divestment penalty so that no Medicaid services would be covered during the penalty period. Penalizing the transfer of assets by imposing complete Medicaid ineligibility would eliminate the provision of costly acute and primary health care services to persons serving a divestment penalty. It would also make it more difficult for individuals to conduct Medicaid estate planning, due to the uncertainty of the total amount of acute and primary care expenses that would be incurred. Fewer individuals may be willing to risk payment of all Medicaid expenses, than would risk long-term care expenses only.
- ◆ Extended Look Back Period. Currently, the look-back period for transfers not involving trusts is 36 months from the institutionalized person's date of application or review, or the Medicaid recipient's date of entry into the institution. The look-back period for transfers involving trusts is 60 months from the date of

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application, review or entry into an institution. Wisconsin could request waiver authority, as have Connecticut and Minnesota, to extend the look back period. Connecticut's look back period is 60 months, while Minnesota's is 72 months. Extending the look back period will deter, or subject to penalty, more transfers for less than fair market value resulting in Medicaid savings.

- ◆ Penalty Period Divisor Currently, the length of the penalty period is determined by dividing the divested amount by the average nursing home cost to a private pay patient (\$4,826). Wisconsin could request waiver authority, as has Minnesota, to change the divisor to the statewide average nursing facility Medicaid payment (\$3,402). This change would result in slightly longer penalty periods and a proportionate increase in Medicaid savings. The Medicaid average, while lower than the private pay average, takes into consideration the available income of persons in need of long-term care and the typical Medicaid payment made to a long-term care facility.
- ◆ Penalty Period Begin Date. Currently, the divestment penalty period begins with the month of the transfer of the asset. Wisconsin could request waiver authority, as has Minnesota, to begin the penalty period at the beginning of the month a person applies for Medicaid and is otherwise eligible, or when the county agency becomes aware of the transfer, whichever is later. For someone already Medicaid eligible the penalty period would begin when the county agency becomes aware of the transfer. This change would close a loophole which now allows persons to transfer assets for less than fair market value, calculate the number of penalty months, and keep only enough to pay for care during that period, essentially serving their "penalty" before even applying for Medicaid.
- ◆ Limitations on Transfers to Spouses. Currently, transfers for less than fair market value are permitted to, or for the sole benefit of, the spouse of the Medicaid eligible long-term care recipient without further limitation. Wisconsin could request waiver authority, as has Minnesota, to permit such spousal transfers for less than fair market value, only in an amount allowed under spousal impoverishment asset provisions. As such, spousal impoverishment protections would remain, but assets acquired by, or made available to the Medicaid eligible long-term care recipient in excess of the protected amounts would be required to be spent meeting his/her long-term care needs.

Which is the  
spousal  
impover value,  
the transfer or  
fair value?

transfer to  
MA spouse?

### Rejected Divestment Waiver Ideas

There were several ideas DHCF staff encountered in the waivers submitted by other states that go beyond our stated goal of closing the loopholes for divestment in federal law and instead would make changes to Department public policy goals. These ideas include:

- ◆ Limitations on Homestead Property Transfers to Relatives Currently, the person is allowed to divest homestead property under certain circumstances (e.g. to

## **DRAFT Medicaid Divestment Concept Paper**

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his/her spouse, to a child who is disabled or under 21, to a sibling who lives in the home and has ownership interest, etc.) Wisconsin could request waiver authority, as has Minnesota, to prohibit the transfer of the person's interest in a homestead even to specified relatives, but allow the homestead to retain excluded status as long as the specified relative continued to reside there. Prohibiting the transfer of homestead property, but maintaining the exclusion while the relative lives in the home, balances Medicaid savings against one's need for housing. The change would also bring divestment policy more into line with estate recovery policy, which prohibits recovery against the same group of relatives, but only to the extent that they reside in the home at the time of probate.

- ◆ *Limitations on Transfers to Trusts for Disabled Children* Federal law permits transfers for less than fair market value to trusts for the sole benefit of children disabled according to SSI criteria. The principal of such trusts does not revert to the state after the disabled child's death to repay the Medicaid program. Wisconsin could request waiver authority, as has Minnesota, to allow the state to recover Medicaid payments made on behalf of the trust grantor, the trust beneficiary, or both, following the death of the disabled child.
- ◆ *Limitations on Transfers to Trusts for Disabled Adults* Currently, transfers for less than fair market value are permitted to trusts for the sole benefit of persons under 65 who are disabled according to SSI criteria. Wisconsin could request waiver authority, as has Minnesota, to prohibit transfers to trusts for people with a disability who are under age 65 and who are not the children, adopted children, or legal wards of the transferor. As such, limitations would be placed on transfers made to persons for whom the transferor has no legal obligation.

### **Impact on Individuals**

The cumulative effect of the proposed changes is to greatly limit the options currently available to individuals who need long term care and have significant resources to shelter or transfer their assets to qualify for Medicaid coverage. These changes will mean that individuals with significant resources will need to exhaust those resources for the cost of their health care before Medicaid would begin paying for their care. We have estimated that these changes would delay the conversion from private pay to Medicaid coverage of long term care costs for an average of seven months for individuals who would currently divest and qualify immediately for Medicaid coverage for savings of nearly \$25,000 per individual.

Although some individuals may choose to forgo seeking health care in order to preserve the inheritance which they wish to pass onto their children and grandchildren, these changes do not affect the ability of these individuals to seek and receive necessary health care services. In addition, these changes do not change the protections against impoverishment afforded spouses of institutionalized Medicaid recipients under current federal and state law.

## DRAFT Medicaid Divestment Concept Paper

### Impact on Nursing Home/Long Term Care Industry

With tighter divestment rules which delay the time at which the individual converts from private pay to Medicaid status, nursing homes and other long term care providers should be able to alleviate some of the fiscal pressure on these providers as more of their customers use Medicaid as their primary payment source.

#### Savings:

A conservative estimate of the savings that would result from these changes is shown below. These savings include only Medicaid savings associated with nursing home care. No savings can be projected for community waiver programs, since these programs have waiting lists and individuals on the waiting lists will move into 'slots' that currently go to individual who qualify by sheltering or transferring their assets. Please note that savings build over time, because we cannot impose a new divestment policy retroactively.

	Year One	Year Two	Year Three	Year Four	Year Five
<b>Number of individuals affected</b>	99	398	458	474	483
<b>All Funds</b>	\$ 2,803,968	\$11,244,139	\$12,952,185	\$13,385,455	\$13,662,376
<b>GPR</b>	\$ 1,177,666	\$ 4,722,538	\$ 5,439,917	\$ 5,621,891	\$ 5,738,198
<b>FED</b>	\$ 1,626,302	\$ 6,521,601	\$ 7,512,267	\$ 7,763,564	\$ 7,924,178



State of Wisconsin  
2005 - 2006 LEGISLATURE

LRB-4168/T

PJK:A:....

JLD

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

D-note  
500N  
(in 12-1)

Gen

1 AN ACT ...; relating to: waiver of certain divestment requirements under Medical  
2 Assistance. ✓

---

✓ *Analysis by the Legislative Reference Bureau*  
This is a preliminary draft. An analysis will be provided in a later version.

---

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

3 SECTION 1. Nonstatutory provisions.

4 (1) WAIVER OF DIVESTMENT REQUIREMENTS. ✓

5 (a) The department of health and family services ✓ shall request a waiver from  
6 the secretary ✓ of the federal department of health and ✓ human services, under 42 USC  
7 1315 (a), that would permit the department of health and family services to  
8 implement the following changes with respect to asset divestment. ✓

9 1. Increasing the look-back period for all divestments to 72 months.

10 2. Changing the time at which an individual's period of ineligibility for medical  
11 assistance for long-term ✓ care begins on account of transferring assets for less than

✓ and ineligibility for medical assistance

1 fair market value to the first day of the month in which the individual applies for  
2 medical assistance or in which the county department becomes aware of the transfer  
3 of assets for less than fair market value, whichever is later.

4 3. Eliminating the exemption for certain assets from the prohibition on transfer  
5 for less than fair market value, except for the exemption with respect to undue  
6 hardship.

7 4. Making an individual ineligible for all Medical Assistance services during  
8 the individual's period of ineligibility for medical assistance for long-term care on  
9 account of transferring assets for less than fair market value.

10 5. Changing the way in which an individual's period of ineligibility is  
11 determined by using the average monthly amount paid for nursing facility services  
12 in this state on behalf of an individual receiving medical assistance instead of the  
13 average monthly amount paid for nursing facility services in this state by a private  
14 pay individual.

15 6. Eliminating the exemption for interspousal transfers of assets for less than  
16 fair market value, but limiting the amount that may be transferred to the amount  
17 allowed under the spousal impoverishment asset provisions of the statutes.

18 (b) If the waiver is approved with respect to any of the changes, or if federal law  
19 is changed to permit implementation of any of the changes, the department of health  
20 and family services shall submit to the legislature in the manner provided under  
21 section 13.172 (2) of the statutes proposed legislation implementing those changes.

22 (END)

D-note

**DRAFTER'S NOTE  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

LRB-4168/dn

PJK:.....

PI  
jkl

I think it is extremely inadvisable to actually amend the statutes at this time. Therefore, I required DHFS to request a waiver for making the changes in divestment proposed in the DHFS concept paper.

If the statutes are amended at this time, they would be misleading because they would not really be the law. Most people do not know about the administrative register and so would not be looking there for the effective date, if and when the statutes ever actually did go into effect.

What if the waiver were never granted and federal law never changed? What if a waiver were approved or federal law changed but in a respect that was different from how the statutes would be amended? In either of those cases, the statutes would be incorrect and would, at some point, have to be either put back into the form under current law or amended to reflect a new agreement or new federal law.

Most, if not all, of the changes require an initial applicability, which would have to reference the effective date, which is nothing more than the date provided in the administrative register, if and when there ever is a date. The contingent initial applicability and effective date provisions would be probably three to four times as long as the substantive portion of the draft. The draft itself would be incomprehensible for the initial applicability and effective date provisions.

The better approach is to require DHFS to request a waiver and submit proposed legislation that implements the actual changes approved under the waiver or under federal law when either one requires or allows those changes.

Do you want to require DHFS to submit the waiver request by a certain time?

Pamela J. Kahler  
Senior Legislative Attorney  
Phone: (608) 266-2682  
E-mail: pam.kahler@legis.state.wi.us

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-4168/P1dn

PJK:jld:pg

December 2, 2005

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Pamela J. Kahler  
Senior Legislative Attorney  
Phone: (608) 266-2682  
E-mail: [pam.kahler@legis.state.wi.us](mailto:pam.kahler@legis.state.wi.us)



12-20

Sara Buschman

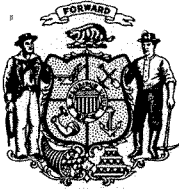
re LRB-4168

keep as a requirement for a waiver -

require waiver to be requested

W/ in 6 months after effective

date of act



State of Wisconsin  
2005 - 2006 LEGISLATURE

LRB-4168/PA

PJK:jld:pg

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

Reger

1 AN ACT relating to: waiver of certain divestment requirements under Medical  
2 Assistance.

*Analysis by the Legislative Reference Bureau*

*This is a preliminary draft. An analysis will be provided in a later version.*

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

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5 (a) The department of health and family services shall request a waiver from  
6 the secretary of the federal department of health and human services, under 42 USC  
7 1315 (a), that would permit the department of health and family services to  
8 implement the following changes with respect to asset divestment and ineligibility  
9 for medical assistance:

10 1. Increasing the look-back period for all divestments to 72 months.

Insert A

Insert 1-5

1           2. Changing the time at which an individual's period of ineligibility for medical  
2           assistance for long-term care begins on account of transferring assets for less than  
3           fair market value to the first day of the month in which the individual applies for  
4           medical assistance or in which the county department becomes aware of the transfer  
5           of assets for less than fair market value, whichever is later.

6           3. Eliminating the exemption for certain assets from the prohibition on transfer  
7           for less than fair market value, except for the exemption with respect to undue  
8           hardship.

9           4. Making an individual ineligible for all Medical Assistance services during  
10          the individual's period of ineligibility for medical assistance for long-term care on  
11          account of transferring assets for less than fair market value.

12          5. Changing the way in which an individual's period of ineligibility is  
13          determined by using the average monthly amount paid for nursing facility services  
14          in this state on behalf of an individual receiving medical assistance instead of the  
15          average monthly amount paid for nursing facility services in this state by a private  
16          pay individual.

17          6. Eliminating the exemption for interspousal transfers of assets for less than  
18          fair market value, but limiting the amount that may be transferred to the amount  
19          allowed under the spousal impoverishment asset provisions of the statutes.

20               (b) If the waiver is approved with respect to any of the changes, or if federal law  
21               is changed to permit implementation of any of the changes, the department of health  
22               and family services shall submit to the legislature in the manner provided under  
23               section 13.172 (2) of the statutes proposed legislation implementing those changes.

24                               (END)

2005-2006 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRB-4168/lins  
PJK:jld:pg

INSERT A

Under current law, generally, a person is ineligible for Medical Assistance (MA) for payment of nursing home services and other long-term care for a period of time if the person or his or her spouse transfers assets for less than fair market value (divests assets) within a certain time before the person applies for MA. (The MA ineligibility rules related to this divestment are based on federal law. plain

This bill requires the Department of Health and Family Services (DHFS) to request a waiver from the secretary of the federal Department of Health and Human Services that would allow DHFS to implement certain changes in the rules related to divestment and ineligibility for MA and to submit proposed legislation that implements the changes if the waiver is granted. Those changes include the following:

1. Increasing to 72 months the time before application for MA that divesting assets would result in ineligibility for MA. Currently that time, called the look-back period, is 36 months.

2. Changing the time for when the person's ineligibility begins to the first day of the month in which the person applies for MA or the first day of the month in which the county department becomes aware of the divestment, whichever is later. Currently the ineligibility period begins on the first day of the first month beginning after the person divests the assets.

3. Except for undue hardship, eliminating the exemptions for certain divestments, such as divestment of homestead property or if it can be shown that the divestment was not made with the intent of receiving MA. a

4. Making a person ineligible for the specified time after divestment for all MA services. Currently a person is ineligible for MA for only nursing home and other long-term care services.

5. Changing the way in which the length of the ineligibility period is determined by using the average monthly amount paid for nursing facility services in this state on behalf of a person receiving MA. Currently the length of the ineligibility period is determined by dividing the divested amount by the average monthly amount paid for private pay nursing facility services.

6. Eliminating the exemption for interspousal transfers of assets for less than fair market value. The exemption would be eliminated, however, only for amounts that exceed the asset amount that may be transferred by an institutionalized spouse receiving MA to a noninstitutionalized spouse under the spousal impoverishment provisions of the law.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

(END OF INSERT A)

INSERT 1-5



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not

ins 1-5

, within 6 months after the effective date of this paragraph,

✓  
No  
A

(END OF INSERT 1-5)

**Northrop, Lori**

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**From:** Buschman, Sara  
**Sent:** Thursday, January 12, 2006 3:38 PM  
**To:** LRB.Legal  
**Subject:** Draft review: LRB 05-4168/1 Topic: Various modifications to MA divestment rules

It has been requested by <Buschman, Sara> that the following draft be jacketed for the ASSEMBLY:

Draft review: LRB 05-4168/1 Topic: Various modifications to MA divestment rules